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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1215

LEONARD EAST and ALVIN G. EAST, doing business as L. EAST PRODUCE COMPANY,
Petitioners

Versus

PAUL A. PORTER, ADMINISTRATOR, Office of Price Administration,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

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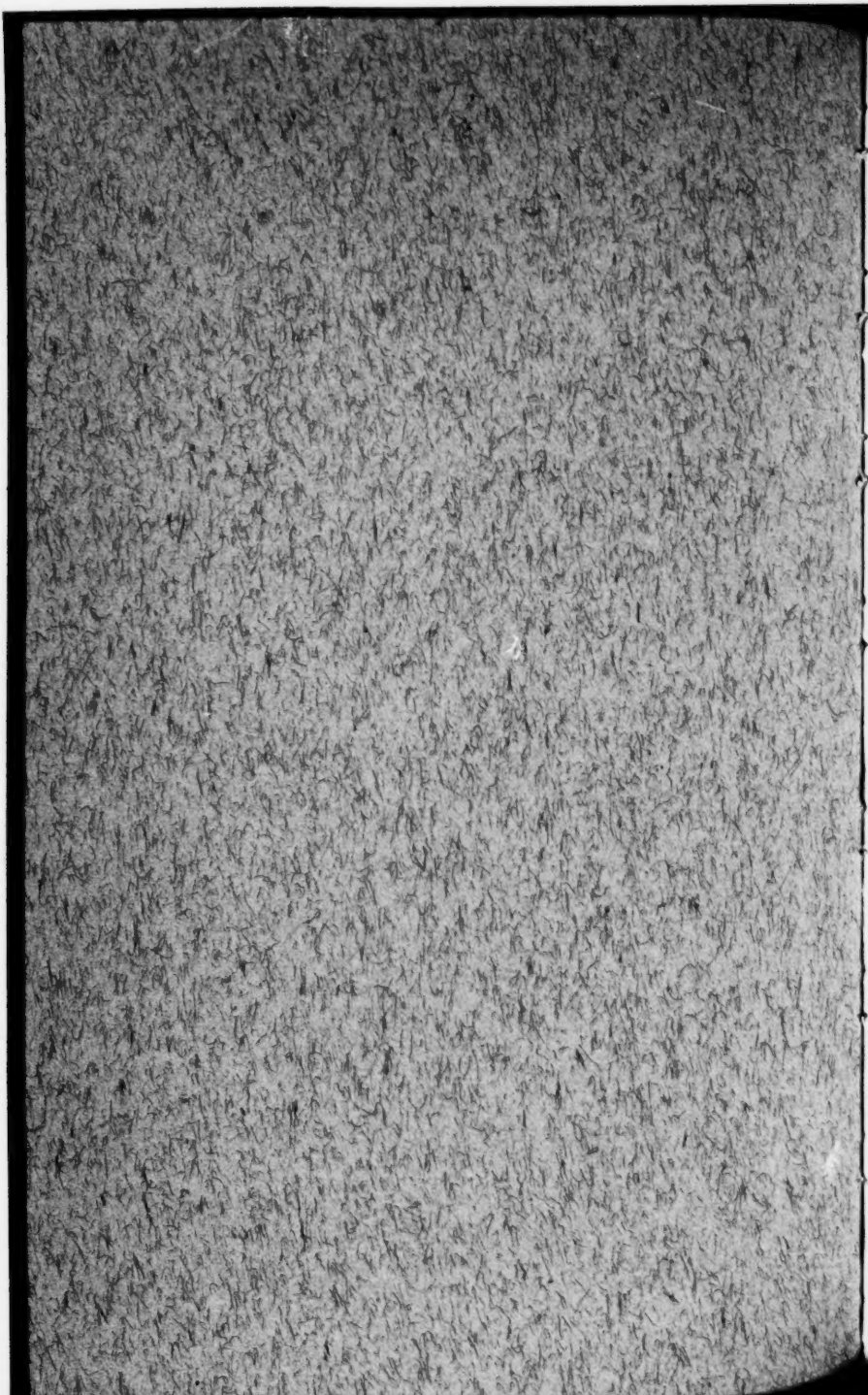

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TO THE SUPREME COURT OF THE UNITED STATES:

Leonard East and Alvin G. East, doing business as L. East Produce Company, respectfully petition that a Writ of Certiorari issue to review the final judgment of the United States Circuit Court of Appeals, Fifth Circuit, affirming the judgment of the United States District Court, Western District of Texas, Austin Division, entered in this cause.

Opinions Below

No opinion was written by the United States District Judge.

The *per curiam* opinion of the Circuit Court of Appeals (composed of Circuit Judges Hutcheson, Holmes and McCord) was rendered December 2, 1946, (R. 191); and is reported in 158 F. (2d) 227.

Jurisdiction

Jurisdiction is invoked under *Section* 240 (a) of the *Judicial Code*, as Amended, (Title 28, U. S. Code, Sec. 347 (a)).

The judgment of the Circuit Court was entered on December 2, 1946. (R. 195). Petition for Rehearing was properly filed on December 20, 1946, (R. 196), which was denied without written opinion on January 7, 1947. (R. 204).

Summary Statement

Complaint was filed by the Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act of 1942, as Amended, (Pub. Law 421, 77th Cong., 2nd Sess., 56 Stat. 23, 765, 57 Stat. 566, Pub. Law. 383, 78th Cong.) against petitioners, seeking treble damages as a penalty for alleged violations of Section 4 (a) of said Act, arising from alleged overcharges for two sales and deliveries of dressed poultry in excess of ceiling prices fixed by Second Revised Maximum Price Regulation No. 269, as Amended. (R. 1-5).

The essence of the complaint was that petitioners sold and delivered a purported quantity by weight of dressed poultry *at a legal price charged per pound,* but that a lesser quantity was actually delivered and received by the buyer, and by reason of "delivery of short weights" the shipment invoices constituted actual overcharges per pound. (R. 9-11).

Petitioners answered that:

> (a) The complaint was insufficient and failed to state a cause of action, because it did not allege the acts charged were willfully, intentionally, or knowingly committed by petitioners (R. 12);
>
> (b) Petitioners were not guilty of any act or conduct in violation of the regulation order or price schedule (R. 13);
>
> (c) If any violation had occurred, it was not willful, nor the result of a failure to take practicable precautions against its occurrence R. 13).

In open court counsel for the Administrator recognized the necessity of proving the alleged violations occurred by reason of *intentional, purposeful,* or *knowing acts* of petitioners, stating: "I think we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

The Administrator proved only that the buyer ordered, petitioners sold, and the buyer bought a specified number of pounds of dressed poultry *at a legal price per pound* (R. 71-72, 55); that petitioners shipped, by a public common carrier, the number of

pounds ordered by the purchaser, and invoiced the purchaser for that poundage *at the agreed, legal sale price per pound;* but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and as invoiced. (R. 76-77, 78, 72).

The Administrator offered no proof whatsoever that prior to this suit petitioners *knew* the weights of the fryers received by the purchaser were less than the weights shipped and invoiced, *nor that petitioners knowingly, purposely or intentionally billed the purchaser for greater weights than were received.*

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this penalty suit; and that immediately upon learning of the buyer's claim that lesser weights were received, petitioners mailed invoices for those weights *at the agreed, legal price per pound,* refused to accept a check from the buyer for the amount of the original invoices, but subsequently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate per pound.* (R. 84-85, 87, 81-82, 57, 63).

When the Administrator rested his case, petitioners moved for an instructed verdict on the ground that the proof failed to show any violation as charged (R. 139). The motion was overruled and exception taken.

Petitioners proved they operate a large concern, having many departments and doing a large monthly business (R. 140-141, 145); that petitioners had

no particular knowledge of these orders and shipments except as reflected by their office records (R. 145, 147); that the orders were received, filled and shipped by petitioners in the regular course of business (R. 142-143); and that petitioners' office records and the Express Company's Bill of Lading show shipments of the weights of poultry ordered by the purchaser (R. 156-157, 158); and that, accordingly, invoices for those weights *at the agreed, legal charge per pound* were mailed to the buyer (R. 61, 142); that petitioners first learned of the claim that buyer received *lesser* weights when this suit was filed (R. 150, 147); whereupon petitioners mailed invoices for the weights claimed to have been received by the purchaser *at the agreed, legal charge per pound* (R. 151-152), refused to accept payment in the amount of the original invoices, but subsequently received and accepted payment for the number of pounds claimed to have been received by the purchaser *at the agreed, legal price per pound* (R. 152).

When the case was concluded, petitioners moved for an instructed verdict, but the motion was overruled and exception taken (R. 167).

Prior to submission of the court's charge to the jury, petitioners requested the submission of special issues for the jury to find whether petitioners charged the purchaser in excess of the legal price per pound for the poultry; whether or not petitioners willfully or knowingly delivered less weights of poultry than invoiced with the intent to charge and collect a price in excess of the maximum legal price per pound; whether or not when petitioners

billed the purchaser by the original invoices, petitioners knew a shortage existed in the poultry shipped to and received by the purchaser; and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. (R. 13-25). The requested issues were refused by the court and exceptions taken. (R. 13-25).

The court charged the jury that the alleged violations were not by virtue of excessive charges on a per pound basis, but *if any violations were committed, this was by reason of shortage of weight in the deliveries to the purchaser.* (R. 170-171). Only eight special issues were submitted, composed of four inquiries relating to each of the two shipments:

> (1) Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);
>
> (2) The number of pounds *delivered* in each shipment (R. 173, 176-177);
>
> (3) Whether the *deliveries* of such lesser weights were not willful (R. 174, 177); and
>
> (4) Whether the *deliveries* of such lesser weights were not the result of petitioners' failure to take practicable precautions "against the occurrence of the violations," if the jury "found that there was a violation." (R. 175-176, 178).

Petitioners properly objected and excepted to the court's charge to the jury because of the failure to submit the issues requested by petitioners, because the court failed to submit any issue to find whether

petitioners knowingly shipped and delivered less weights than those charged in the invoices to the buyer, and because the court failed to submit any issue for the jury to find whether petitioners knowingly charged the buyer for the weights invoiced with knowledge that lesser weights had been shipped and delivered to the buyer (R. 28-32).

The jury's answers to the issues submitted found:

(1) That petitioners *delivered* less weights of poultry than contained in the invoices. (R. 32, 35).

(2) The actual weights *delivered and received* by the purchaser. (R. 33, 36).

(3) *That petitioners did not willfully deliver less weights than invoiced* (R. 33-34, 36-37), and

(4) That such *deliveries* of lesser weights were not the result of petitioners' failure to take practicable precautions (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the Jury to Special Issues Nos. 3, 4, 7, and 8 *(that the deliveries of lesser weights were not willful, nor the result of a failure to take practicable precautions)*, the grounds being that these answers constituted a finding that no violations had been committed by petitioners as charged (R. 39-42). The motion was overruled, and petitioners excepted (R. 186-187).

The District Court entered judgment for the Administrator, assessing against petitioners a single

penalty for the amount of the alleged overcharges (R. 42-49); and an appeal was duly perfected to the United States Circuit Court of Appeals, Fifth Circuit, which affirmed the Distrct Court judgment by *per curiam* opinion rendered December 2, 1947.

Questions Presented

1.

Whether it is a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act for a vendor to sell, ship and invoice the buyer for a quantity of merchandise *at an agreed, legal price*, if upon delivery the buyer actually receives a lesser quantity of merchandise *without the seller's knowledge of the shortage.*

2.

Whether it is a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act for a vendor to sell, ship, and invoice the buyer for a quantity of merchandise *at an agreed, legal price*, but there is an unintentional, inadvertent, accidental or mistaken delivery to the buyer of a lesser quantity than invoiced *without the knowledge or fault of the seller.*

3.

Whether proof that a vendor sold, shipped and invoiced the buyer for a quantity of merchandise

at an agreed, legal price, and that a lesser quantity of merchandise was actually received by the buyer *without the seller knowing of the shortage when invoices were sent to the buyer*, is sufficient to show a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act.

4.

Whether the burden of proof upon the Administrator to show a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act through sale, delivery or charge for merchandise at a price in excess of the maximum price is discharged by proof that a vendor shipped and invoiced the buyer for a quantity of merchandise *at an agreed, legal price*, but that a lesser quantity of merchandise was actually received by the buyer *without the seller's knowledge of the shortage.*

5.

Whether, in a penalty suit for alleged violation of an OPA Maximum Price Regulation and the Emergency Price Control Act, the District Judge, upon proper request, should submit an issue to the jury to find whether or not the alleged overcharge and violation was committed.

6.

Whether a jury finding that a vendor, who sold, shipped and invoiced the buyer for a quantity of

merchandise *at an agreed, legal price*, did not willfully or carelessly deliver a lesser quantity to the buyer than invoiced constitutes a finding that the seller did not violate an OPA Maximum Price Regulation and the Emergency Price Control Act by selling, delivering or charging for the merchandise at a price in excess of the maximum price.

Specifications of Error

The Circuit Court of Appeals erred in the following respects:

1.

In affirming the District Court judgment, because the Administrator failed to prove that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

2.

In affirming the District Court judgment herein, because the jury did NOT find that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

3.

In affirming the District Court judgment herein, because the jury in answer to Special Issues Nos. 3 and 7 found that petitioners did not knowingly

deliver less amounts of poultry than invoiced, and thus the jury necessarily found that petitioners did not violate the OPA Maximum Price Regulation herein.

4.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue for the jury to find whether petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

5.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue to the jury to find whether petitioners knowingly shipped less amounts of poultry than invoiced with intent to charge or collect a price in excess of the maximum price therefor.

6.

In holding: "The defense was a denial of a violation *in* that the overcharge, if any occurred, was not willful or intentional nor was it the result of a failure to take practicable precautions against the occurrence of a violation," because petitioners pleaded: (a) that the complaint failed to state a cause of action, because no willful, intentional or knowing act of petitioners was alleged; (b) that *no violation of any OPA regulation, order or price*

schedule had been committed by any action or conduct of petitioners; and (c) that *if* any violation had occurred, it was not willful nor the result of a failure to take practicable precautions against the occurrence of a violation (R. 5-7, 12-13).

7.

In holding there was evidence "that the amount charged for the poultry was in excess of the ceiling price," because the Administrator did not prove that petitioners knowingly shipped or delivered less amounts of poultry than invoiced, nor that petitioners intended to invoice, charge or collect for a greater amount of poultry than was shipped or delivered and thus charge or collect a price in excess of OPA maximum price therefor.

8.

In holding that "the jury returned a verdict on special issues finding: (1) that the *shipments* were short in weight," because the jury found only that there was *delivered to the mess* less amounts of poultry than invoiced (R. 172-173, 176).

9.

In holding that "defendants moving for judgment on this verdict, insisted that since the jury had acquitted the defendants both of willfulness and want of care, defendants should have had judgment," because petitioners moved for instructed verdict after

the Administrator had rested the case, and moved for instructed verdict after close of the testimony, on the ground that *as a matter of law* no violation had been proved by the Administrator; and petioners moved for judgment upon the jury's findings to Special Issues Nos. 3 and 7, because the jury found that no violation had been committed in that the jury found that petitioners did *not* knowingly or with wrongful purpose deliver less amounts of poultry than invoiced.

10.

In holding "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be," because an unintentional, inadvertent, accidental or mistaken shipment of a lesser poundage than invoiced does not constitute a sale, delivery or overcharge in violation of the OPA Maximum Price Regulation herein.

11.

In holding that the jury's verdict "did not furnish any basis for denying recovery. Indeed, it furnished the basis for the judgment entered. It found that *the shipment* was short by a number of pounds," because the jury found (a) that the weights of poultry *delivered* to and received by the Mess were less than the invoiced weights; (b) that the *delivery* of such weights was not done knowingly or with wrongful purpose; and, therefore, necessarily found

(c) that *petitioners did not knowingly or intentionally invoice for greater weights than delivered;* thus, the jury necessarily found that petitioners did not sell, deliver or charge for poultry at a price in excess of OPA maximum price therefor.

12.

In affirming the District Court judgment herein, because the Court found from the undisputed proof herein that petitioners sold the poultry herein *at the legal price of 45¢ per pound* and invoiced for the poultry *at the legal price of 45¢ per pound* and did not sell, invoice or charge for the poultry by the box, package or individual chicken.

Each of the foregoing Specifications of Error was properly raised and presented in the Circuit Court of Appeals.

Reasons for Granting the Writ

1. The opinion of the Circuit Court of Appeals holds that "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be." The necessary effect of this ruling is to give encouragement to the Office of Price Administration to institute countless penalty suits for alleged violations of OPA Maximum Price Control Regulations and the Emergency Price Control Act in every instance where a vendor has sold merchandise *at a lawful price* but there has been an unintentional, inadvertent, mis-

taken, or accidental delivery of a lesser quantity to the buyer, *whether or not the vendor was at fault or had knowledge of the shortage.*

Thus the rulings of the Circuit Court of Appeals in its opinion constitute a flagrant and untenable departure from entrenched principles of law applicable to suits for penalties which are of peculiar gravity and importance to the public generally because of the wide scope of the authority vested in the Office of Price Administration.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by the Supreme Court, in holding that a seller who sells, ships and invoices a buyer for a quantity of merchandise at an agreed, legal price is guilty of a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act *if, through loss in transit, or by inadvertence, mistake, or accident, there occurs an unintentional delivery to the buyer of a lesser quantity of merchandise than invoiced by the seller.*

3. The ruling of the Circuit Court of Appeals, that it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage (*unintentionally or unknowingly*) short as it would be to bill the shipment at a price per pound above the ceiling price, is probably in conflict with decisions of other Circuit Courts of Appeals.

In *United States vs. Steiner*, (C. C. A. 7) 152 F. (2d) 484, 487, the complaint charged violation of OPA ceiling prices by tractor sales, and the defense

was that a bona fide lease transaction had occurred; and the Court held a question of fact was presented to determine *whether a good faith lease existed* or a device occurred *knowingly, intentionally and willfully* to evade the statute and price regulation.

In *Zimburg vs. United States,* (C. C. A. 1) 142 F. (2d) 132, the defendant was charged with violations through evasions and subterfuge, and the Court affirmed conviction because the evidence showed defendant *knowingly* had used a scheme, method and practice to evade the price regulations.

In *Bowles vs. Arlington,* (C. C. A. 7) 148 F. (2d) 467, a dealer through auctioneers sold used machinery as rebuilt and guaranteed, and the Circuit Court reversed the case as to the auctioneers because the evidence was insufficient to show that the auctioneers had *knowledge* the machines were not rebuilt and guaranteed when sold as such.

And such holding is probably in conflict with decisions of the Federal District Courts in *Bowles vs. Assad,* (D .C. Penn.) 56 Fed. Sup. 8, in which a broker handling a shipment of steel scrap *in good faith and without knowledge* of the content was held not to have violated a price regulation; and in *Brown vs. Banana Distrib. of America,* (D. C. Conn.) 52 Fed. Sup. 804, where it was held that to show a violation of OPA ceiling prices in a complaint charging violation by a tying-in agreement as a means of evasion, it must be made to appear *that the practice was so used* to justify a violation of the Act; and in *Bowles vs. Cunningham,* (D. C. Penn.) 61 Fed. Sup. 162, where it was held that

in the absence of a conclusive showing that defendants *knowingly* violated the price regulation by exceeding ceiling prices no injunction would issue, as defendant *having no knowledge* of the transportation costs was not properly chargeable with exceeding the ceiling price.

4. The rulings and errors of the Circuit Court of Appeals in this case are patently and grossly unjust to petitioners, who have been adjudged guilty of violating the OPA Maximum Price Regulation and the Emergency Price Control Act by charging excess prices for poultry despite the *uncontradicted* evidence that petitioners sold and the purchasers bought the poultry *at a legal price per pound*, that petitioners invoiced the buyer for the poultry *at a legal price per pound*, that the petitioners shipped to the buyer, by common carrier, the weights of poultry for which invoices were sent the buyer, and that the deliveries to the buyer of lesser weights than invoiced *were without the knowledge of petitioners;* and the jury found petitioners *neither willfully nor carelessly delivered such lesser weights.*

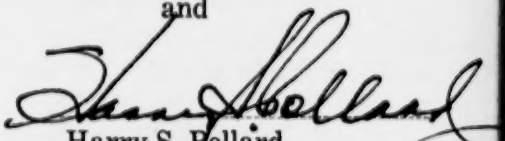
The penalty assessed against petitioners is trivial (amounting only to $156.85), the subsequent court costs in this suit being several times greater than the penalty; but the principle involved in this case is not only of general importance to the OPA-governed and regulated public, but is also of infinite importance to petitioners because this conviction for alleged violation of maximum price regulations is of incalculable damage to the good reputation of the long-established business of petitioners, through

the resulting stigma of the conviction of having engaged in black-market sales.

Conclusion

Petitioners respectfully pray that a Writ of Certiorari issue in this case to the end that the judgments of the Circuit Court of Appeals and the District Court may be reviewed, the judgments of the courts below reversed, and that judgment be rendered in favor of petitioners; and for general relief.

SMITH and POLLARD
W. R. Smith, Jr.
and



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